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DEPARTMENT OF ENERGY

10 CFR Part 609

RIN: 1901-AB32

Loan Guarantees for Projects That Employ Innovative Technologies

AGENCY: Loan Programs Office, Department of Energy.

ACTION: Final rule; technical amendment.

SUMMARY: The Department of Energy (DOE) is publishing this technical amendment to the regulations for the loan guarantee program authorized by Section 1703 of Title XVII of the Energy Policy Act of 2005 (Title XVII) to incorporate, without substantive change, an amendment to Section 1702(b) of Title XVII enacted by Section 305 of the Consolidated Appropriations Act, 2012.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

Section 305 of the Consolidated Appropriations Act, 2012 amended Section 1702(b) of Title XVII by striking the existing subsection (b) and inserting instead a provision that makes clear no guarantee shall be made unless an appropriation for the cost of the guarantee has been made; the Secretary has received from the borrower a payment in full for the cost of the guarantee and deposited the payment into the Treasury; or a combination of one or more appropriations and one or more payments from the borrower has been made that is sufficient to cover the cost of the guarantee.

II. Summary of Today's Action

Today's action is a technical amendment to revise the regulations for the loan guarantee program authorized by Section 1703 of Title XVII to incorporate, without substantive change, the amendment to Section 1702(b) of Title XVII referred to above.

Pursuant to authority at 5 USC 553(b)(B), the DOE finds good cause to waive the requirement for prior notice and an opportunity for public comment on this rulemaking because such procedures would be unnecessary. As DOE is merely inserting into the Code of Federal Regulations statutory provisions already applicable to these loan guarantees and removing language inconsistent with those statutory provisions prior notice and an opportunity for public comment would serve no useful purpose. For the same reason, DOE finds good cause under 5 USC 553(d)(3) to waive the 30-day delay in effective date and make this rule effective immediately.

III. Procedural Requirements

A. Review under Executive Order 12866, "Regulatory Planning and Review"

Today's final rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, "Regulatory Planning and Review." 58 FR 51735 (October 4, 1993). Accordingly, today's action was subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990.

The Department has made its procedures and policies available on the Office of General Counsel's web site: <http://www.gc.doe.gov>. DOE today is revising the Code of Federal Regulations to incorporate, without substantive change, an amendment to Section 1702(b) of Title XVII. Because this is a technical amendment for which a general notice of proposed rulemaking is not required, the Regulatory Flexibility Act does not apply to this rulemaking.

C. Review under the Paperwork Reduction Act of 1995

This rulemaking imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review under the National Environmental Policy Act of 1969

DOE has determined that this rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to Subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review under Executive Order 13132, "Federalism"

Executive Order 13132, "Federalism." 64 FR 43255 (Aug. 10, 1999) imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the

policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

F. Review under Executive Order 12988, "Civil Justice Reform"

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a),(b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at <http://www.gc.doe.gov>). This final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements under the UMRA do not apply.

H. Review under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights"

The Department has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

J. Review under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rulemaking under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This final rule would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 609

Administrative practice and procedure, Energy, Loan programs, and Reporting and recordkeeping requirements.

Issued in Washington, DC, on May 15, 2012.

David G. Frantz
Acting Executive Director
Loan Programs Office

For the reasons set forth in the preamble, DOE hereby amends Part 609 of chapter II of title 10 of the Code of Federal Regulations as set forth below:

**PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY
INNOVATIVE TECHNOLOGIES**

1. The authority citation for part 609 continues to read as follows:

Authority: 42 U.S.C. 7254, 16511–16514.

2. In §609.8 revise paragraph (d) to read as follows:

§609.8 Term sheets and conditional commitments.

* * * * *

(d) DOE’s obligations under each Conditional Commitment are conditional upon statutory authority having been provided in advance of the execution of the Loan Guarantee Agreement sufficient under FCRA and Title XVII for DOE to execute the Loan Guarantee Agreement, and payment in full of the Credit Subsidy Cost for the loan guarantee that is the subject of the Conditional Commitment from one of the following:

(1) A Congressional appropriation of funds;

(2) A payment from the Borrower deposited into the Treasury; or

(3) A combination of one or more appropriations under paragraph (d)(1) and one or more payments from the Borrower under paragraph (d)(2) of this section.

* * * * *

3. In §609.9 revise paragraph (d)(1) to read as follows:

§609.9 Closing on the Loan Guarantee Agreement.

* * * * *

(d) * * *

(1) Pursuant to section 1702(b) of the Act, DOE has received payment in full of the Credit Subsidy Cost of the loan guarantee from one of the following:

(i) A Congressional appropriation of funds;

(ii) A payment from the Borrower deposited into the Treasury; or

(iii) A combination of one or more appropriations under paragraph (d)(1)(i) and one or more payments from the Borrower under paragraph (d)(1)(ii) of this section.

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4. In §609.10 revise paragraph (d)(17) to read as follows:

§609.10 Loan Guarantee Agreement.

* * * * *

(d) * * *

(17) If Borrower is to make payment in full or in part for the Credit Subsidy Cost of the loan guarantee pursuant to section 1702(b)(2) of the Act, such payment must be received by DOE prior to, or at the time of, closing;

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